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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR, PETITIONER

v.

NEIL MCELROY, A. TYLER PORT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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CITATIONS

Case:

Greene v. *McElroy*, 254 F. 2d 944, certiorari granted, 358 U.S. 872, No. 180, this Term .. 3, 5, 6, 10, 21, 24–25

Miscellaneous:

Defense Department Directive 5220.6 (20 Fed. Reg. 1553) .. 6, 10

Department of Defense Industrial Security Manual for Safeguarding Classified Security Information (19 Fed. Reg. 2206; 20 Fed. Reg. 6218):

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OPINION BELOW

The oral opinion of the United States District Court for the District of Columbia (R. 473–74) is not reported.

JURISDICTION

The order of the District Court granting respondents' motion for summary judgment and dismissing the complaint was entered on October 14, 1958 (R. 475–76). A notice of appeal to the Court of Appeals for the District of Columbia Circuit was filed on the same day (R. 476), and the appeal was docketed in that court on October 16, 1958 (R. 477). The case was not submitted to or decided by the Court of Appeals. The petition for a writ of certiorari was filed on November 8, 1958, and was granted on December

15, 1958 (R. 480). 358 U.S. 918. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, an employee of a government contractor engaged in defense production of a classified nature, was denied access to classified defense information after a determination by appropriate government officials that the granting of such access would not be clearly consistent with the interests of national security. The determination was made on the basis of evidence offered by petitioner and confidential information contained in government files, summaries of which were furnished to petitioner to the extent permitted by security considerations. Subsequently, by order of the Acting Secretary of Defense, the adverse determination was set aside, petitioner's requested clearance was granted, and all prior findings in the case were expunged. The questions presented are:

1. Whether the order setting aside the adverse determination, granting petitioner the security clearance requested by his employer, and expunging all prior findings in the case rendered the cause moot.

2. Whether the Department of Defense regulations establishing the procedures pursuant to which petitioner was once denied access to classified information were authorized by statute or otherwise.

3. Whether petitioner has an interest protected by the due process clause of the Fifth Amendment in obtaining from the Department of Defense an affirmative determination that his access to classified defense

information is clearly consistent with the national security.

4. Whether the procedures by which petitioner was once denied access to classified information satisfied the requirements of due process of law.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set out in the Appendix to the brief for the respondents in *Greene* v. *McElroy*, No. 180, this Term.

STATEMENT

Petitioner is a lathe operator (formerly a tool and die maker, or milling machine operator) with the Bell Aircraft Corporation, a company which throughout the relevant period has been engaged in the manufacture of equipment for the armed forces of the United States (R. 13). On June 14, 1957, petitioner was informed by the Director of the Defense Department Office of Industrial Personnel Security Review that "the granting of clearance to you for access to classified defense information is not clearly consistent with the interests of national security" (R. 52). This suit was instituted on April 24, 1958 (R. 1), seeking a judgment (a) declaring that petitioner is entitled to an administrative hearing at which "he is given opportunity to be confronted with the witnesses and the evidence upon which the charges are based;" (b) declaring that "the determination of June 14, 1957 denying [petitioner] access to classified defense information was in violation of his rights under the Fifth Amendment to the Constitution of the United

States;" and (c) restraining the respondents from enforcing the denial of such access and ordering that "said denial be reversed, rescinded and annulled" (R. 6–7).

The District Court, on October 14, 1958, granted the respondents' motion for summary judgment and dismissed the complaint (R. 475–76). An appeal was noted to the Court of Appeals for the District of Columbia Circuit on the same day (R. 476). The petition for certiorari was filed in this Court prior to a hearing in the Court of Appeals. The factual background of the case, both before and after the institution of the litigation, is as follows:

1. *Prior to the filing of the complaint.* Petitioner's employment with Bell Aircraft began on February 21, 1941, and, with the exception of a short period of time not here material, continued uninterrupted until September 11, 1956 (R. 29–32). For almost all of that period, petitioner had a clearance for access to classified defense information up to the level of "confidential," which had been granted him by the Corporation in accordance with a basic security agreement entered into with the Government for the performance of defense contracts (R. 29–30, 31–32). That agreement incorporated by reference the requirements of the Department of Defense Industrial Security Manual for Safeguarding Classified Security Information (R. 14–15), which in turn provided:

> [§ 66.6] *General requirements.* The Contractor * * *
>
> (c) Shall exclude (this does not imply the dismissal or separation of any employee) from

any part of his plants, facilities, or sites at which classified work for any military department is being performed, any person or persons whom the Secretary of the military department concerned or his duly authorized representative, in the interest of security, may designate in writing.

* * * * *

[§ 66.16] *General.* An individual shall be permitted to have access to classified information only when cleared by the Government or by the contractor, as the case may be, as specified by this subpart. He will be given access to such material on a "need to know" basis and only to the extent of his clearance. * * *

[§ 66.18] *After award of contract.* (a) In the event a contract is awarded, in addition to those individuals cleared under the provision of § 66.17, access to classified information, except as provided in paragraph (b) of this section, is authorized only to individuals as specified in the following:

(1) United States citizen employees of the contractor who require access to information classified "Top Secret" or "Secret" * * * and who have been cleared by the Government.[1]

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[1] The provisions of the Manual are quoted as stipulated by the parties (R. 14–15). Sections 66.16 and 66.18 (as classified to Title 32, C.F.R.) are as amended by 20 Fed. Reg. 6218, effective May 3, 1955. The language of § 66.6 appears unaccountably to have been taken from an earlier version (then § 21.6, 19 Fed. Reg. 2206, effective January 19, 1954), but the differences in wording are immaterial. The provisions of the Manual quoted in our brief in *Greene* v. *McElroy*, No. 180 (at pp. 3–4) are, it may be noted, taken from a still earlier version (January 18, 1951).

In order to utilize petitioner in his capacity as tool and die maker on a contract which required access to classified information up to the level of "secret," Bell Aircraft had petitioner complete the prescribed security forms and submitted those forms to the Defense Department with a request that a "secret" clearance be issued to him (R. 15–16, 30, 32). As the result of the investigation initiated by that request, Bell Aircraft and petitioner were notified, on September 6 and 10, 1956, that petitioner's existing security clearance was suspended pending administrative processing of the case, in accordance with Defense Department Directive 5220.6 (20 Fed. Reg. 1553)[2] (R. 34–36). Petitioner was furnished with a detailed Statement of Reasons for the action and was advised of his right to reply to the statement in writing or to have a hearing (R. 37–40).

In summary, the information contained in the Statement of Reasons was that petitioner had been (for a period of about eighteen months during 1942 and 1943), and might still be, a member of the Communist Party; that he had held Communist Party membership book or card No. 3060; that during the eighteen-month period in question he had regularly paid membership dues to the Party; that he knew, or had reason to know, of the character and purposes of the organization and had been, and might still be, in sympathy with such purposes; that in 1941 and 1942 he had signed nominating petitions for the Communist Party in New

[2] Pertinent portions of the directives are set out in the Appendix to the brief for the respondents in *Greene* v. *McElroy*, No. 180, this Term.

York State elections; that he had a sympathetic interest in Communism; and that he had made misrepresentations in his Personnel Security Questionnaire by denying his membership in the Communist Party.[1] As a result of the suspension of his clear-

[1] The text of the Statement of Reasons (R. 38–40) was as follows:

STATEMENT OF REASONS

(All criteria listed below refer to subparagraphs under Section III, paragraph 13a, Department of Defense Directive No. 5220.6, dated 2 February 1955)

1. Criterion (4):

a. Information before this Board indicates that you have had, and may still have, membership in the Communist Party. This information is:

(1) In 1942 and 1943, for a period of about 18 months, and perhaps for a longer period, you were a member of the Communist Party, and during all or a part of that period, or perhaps for a longer time, you held Communist Party membership book (or card) No. 3060, evidencing your membership in the Communist Party. (The Communist Party has been designated by the Attorney General of the United States, pursuant to Executive Order No. 10450, as having interests in conflict with those of the United States.)

(2) By a Communist Party transfer card dated on or about 15 July 1943, you were transferred from "Branch B and C" of the Communist Party to "Branch 12" of the Communist Party; and on said transfer card it was indicated that your dues had been paid to and including April 1943.

(3) During a period of about 18 months in 1942 and 1943, and perhaps during other years and for a longer period, you paid regular membership dues to the Communist Party.

b. Information before this Board indicates that at the time of your membership in the Communist Party, as aforesaid, you knew of the character, aims and purposes of said organization, or had reason to know and should have known thereof; and that you were, and may still be, in sympathy

ance, petitioner's employment with Bell Aircraft was terminated by the Corporation on September 11, 1956

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with and in support of such aims and purposes. This information is:

(1) In 1941 and 1942, while residing in Buffalo, New York, or thereabouts, you signed Independent Nominating Petitions for the Communist Party, thus signifying a preference for Communist Party candidates in New York State elections.

(2) That contained in subparagraphs a(2) and a(3), [of] paragraph 1.

2. Criterion (10): Information before this Board indicates that you have a sympathetic interest in Communism. This information is that contained in paragraph 1, preceding.

3. Criterion (16): In a Personnel Security Questionnaire signed by you and dated 8 September 1954, and delivered to the Bell Aircraft Corporation, Buffalo, New York, you failed to list the Communist Party in Item 26 thereof which reads "Organizational Membership (List all organizations except labor unions in which you hold or have held membership)," and you indicated "None"; and you certified that the entries made by you in said Questionnaire were true, complete and correct to the best of your knowledge and belief, and were made in good faith. In an attachment to your Personnel Security Questionnaire dated 2 July 1956, Form DD 48-1 "Certificate of Non-Affiliation With Certain Organizations," also dated 2 July 1956 and signed by you, you answered in the negative the questions pertaining to whether you had ever been a member of, or had ever affiliated or associated with, any of the organizations listed in paragraph II, which said paragraph lists as the first item "Communist Party, USA., its subdivisions, subsidiaries and affiliates." In view of the information set forth in paragraph 1 herein, it appears that by such omissions of material facts and by such negative answers, you deliberately misrepresented that which you were required to disclose, to wit, that you were or had been a member of the Communist Party.

4. Criterion (20): Information before this Board furnishes reason to believe that you may be subject to coercion, influence or pressure which may cause you to act contrary to the best interests of the national security. This information is that contained in paragraphs 1, 2 and 3, preceding.

(R. 40–41). Although the company engaged in some work other than defense contracts (R. 13), it was necessary for petitioner to have a "secret" personnel security clearance in order for him to continue to perform his duties as a tool and die maker (R. 13, 30, 32).

On October 9, 1956, petitioner submitted to the Office of Industrial Personnel Security Review an affidavit in reply to the Statement of Reasons and requested that he be given a hearing in person at the earliest possible date (R. 41–45). In general, the affidavit constituted a denial of the matters contained in the Statement of Reasons. In accordance with petitioner's request, a hearing, at which petitioner appeared with counsel, was held before the New York Industrial Personnel Security Hearing Board on November 1, 2, and 14, 1956 (R. 125–425). The Board heard the testimony of petitioner and the witnesses called in his behalf; the Government called no witnesses to testify nor did it produce the confidential investigative reports upon which the Statement of Reasons was predicated (R. 18). On the basis of this hearing, together with the confidential information contained in the government file in the case, petitioner was advised, on June 14, 1957, that the granting of clearance to him for access to classified defense information "is not clearly consistent with the interests of national security" (R. 52). This letter stated that "in reaching this determination, the facts alleged in the Statement of Reasons, and the conclusions drawn therefrom, except as to signing the nominating petitions, were true as stated" (*ibid.*). By a separate letter, Bell Aircraft was informed of this decision and

was advised that the decision was not intended to prevent petitioner from performing such nonclassified work as the Corporation might have available for him (R. 51).

On November 22, 1957, petitioner again set in motion the administrative processes of Directive 5220.6 by requesting Secretary McElroy to reverse the June 14, 1957, determination (R. 53–57). Upon receipt of this request, the case was placed under review, and petitioner's counsel was informed on February 3, 1958, that, although the adverse determination would not be reversed on the basis of the then-existing record (since the findings were reasonably supported), it was found appropriate to reopen the case and to conduct a further investigation to obtain any additional information that might be of value (R. 58–59). On April 17, 1958, the Court of Appeals for the District of Columbia Circuit decided the case of *Greene* v. *McElroy*, 254 F. 2d 944, now pending in this Court on writ of certiorari, No. 180, this Term. On April 24, 1958—and despite the pendency of the administrative proceedings begun at petitioner's request—the present suit was instituted in the District Court.

2. *Subsequent to the filing of the complaint.* On May 30, 1958, Secretary McElroy set aside the June 14, 1957, determination and ordered further proceedings conducted under the provisions of Directive 5220.6 (R. 59–60). Petitioner's counsel was advised that "although, as previously stated, the adverse determination was neither arbitrary nor capricious but was, on the contrary, reasonably supported, nevertheless it is appropriate in this instance to conduct fur-

ther proceedings" (R. 60). Accordingly, the case was once again referred to the New York Industrial Personnel Security Hearing Board for processing (R. 65–66).

On June 19, 1958, petitioner was served with an Amended Statement of Reasons (R. 66–75). In summary, the information contained in this statement paralleled that contained in the original Statement of Reasons, with the following material differences: [4]

[4] The text of the Amended Statement of Reasons (R. 68–75) was as follows:

AMENDED STATEMENT OF REASONS

(All criteria listed below refer to subparagraphs under Section III, paragraph 13a, Department of Defense Directive No. 5220.6, dated February 2, 1955.)

1. Criterion (4): Information before this Board indicates that, with knowledge or reason to know of the subversive aims and purposes of the Communist Party and with intent to support those aims and purposes, you were a member of the Communist Party of Erie County, New York, for a period approximating 18 months in 1942 and 1943, during which period your places of residence in Buffalo, New York, included 523 Masten Avenue and 1464 Michigan Avenue; that during a portion of that period you were sympathetically associated and affiliated with the Communist Party and knowingly and actively cooperated with divers persons known to you to be members of the Communist Party in working for the aims and purposes of the Party; that during the later portion of your said membership in the Communist Party you opposed certain policies of the Communist Party and certain Communist Party endorsed candidates for union office and, instead with knowledge or reason to know of the subversive aims and purposes of the Socialist Workers Party and intending to support those aims and purposes, you became sympathetically associated and affiliated with the Socialist Workers Party, which deviation from the Communist Party policies and from support of candidates together with other factors hereinafter set forth and together with sympathetic association and affiliation with the Socialist

(a) instead of alleging that petitioner might still be a member of the Communist Party, it was stated that he had been expelled from membership in the latter part of 1943; (b) it was not alleged that he had signed nominating petitions for the Communist Party;

Workers Party, resulted in your expulsion from the Communist Party, but notwithstanding all of which you may still be a sympathetic supporter of the subversive aims and purposes of the Communist Party, and may still be sympathetically associated with the Socialist Workers Party.

(*Communist Party:* On May 28, 1942, in connection with the Harry Bridges case that was widely publicized throughout the United States at that time, the Attorney General of the United States characterized the Communist Party of the United States of America as an organization which, "* * * from the time of its inception in 1919 to the present time, * * * believes in, advises, advocates, and teaches the overthrow by force and violence of the Government of the United States."

Even before that date, the Communist Party had been officially characterized by various governmental groups as an instrumentality of the Soviet Union, e.g., the Annual Report of the Special Committee on Un-American Activities, House of Representatives, dated January 3, 1940, wherein it was described as a foreign conspiracy masked as a political party which was actually functioning for the Soviet Union.

Socialist Workers Party: The Socialist Workers Party represents the Trotskyite wing of the Communist movement in the United States. One issue of its official newspaper, "Militant," described its principles in the following language:

"The belief that in such a country as the United States we live in a free democratic society in which fundamental economic change can be effected by persuasion, by education, by legal and purely parliamentary methods is an illusion. While relying primarily on mass actions, propaganda and advocation as the means [to] further its revolutionary aim, the Party will also participate in electoral campaigns, although at all times contending against the fatal illusion that the masses can accomplish their emancipation through the ballot box."

The Socialist Workers Party was officially characterized by the Attorney General of the United States in a letter released

(c) it was alleged that petitioner became actively and outspokenly opposed to certain Party policies and Party-endorsed candidates for union office, that he became sympathetically affiliated with the Socialist Workers Party, that he ceased paying Communist

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for publication on December 4, 1947, as a subversive and Communist organization which seeks to alter the form of government of the United States by unconstitutional means. More recently it has been designated by the Attorney General as an organization within the purview of Executive Order 10450.)

This information is:

(1) You became a member of the Communist Party, Erie County, New York, in about the summer of 1942. You were a member of the Aircraft Division or Aircraft Branch. For a while you were a member of the "B and C" Branch and then, in about July 1943, you were transferred from the "B and C" Branch to the "12th Ward" Branch. Your membership Book No. was 3060.

(2) In the latter part of 1943, you were expelled from membership in the Communist Party. You had personal knowledge of this expulsion.

(3) During the earlier portion of your Communist Party membership in 1942 and 1943, you paid Communist Party dues, sometimes paying them directly to Svea Katz, the Erie County Communist Party Secretary; you attended Communist Party meetings, some of which took place at Communist Party Headquarters at 751½ W. Chippewa Street, Buffalo, New York, and some at your own residence at 523 Masten Avenue; on at least one occasion you distributed Communist Party leaflets at the Municipal Auditorium in Buffalo; you supported Communist Party policies; you followed the Communist Party line.

(4) Later during this same period of Communist Party membership, you became actively and outspokenly opposed, as hereinafter indicated in this subparagraph, to certain Communist Party policies and certain Communist Party endorsed candidates for union office. You opposed the "no strike pledge" and "incentive pay" policies supported by the Communist Party, and you opposed Frankenstein and Addes who were endorsed by the Communist Party as candidates for

Party dues and attending Communist Party meetings, and that he might still be a sympathetic supporter of the subversive purposes of the Communist Party and might still be sympathetically affiliated with the Socialist Workers Party; and (d) it was alleged

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union office. You affiliated yourself with a group of persons who supported Socialist Workers Party policies and objectives such as militant action and strikes. Consistent with Socialist Workers Party policy, and contrary to Communist Party policy, you were one of the leaders in a brief strike at the Bell Aircraft plant where you worked. You stopped paying Communist Party dues and stopped attending Communist Party meetings.

(5) Because of your active opposition to certain Communist Party policies and candidates, you became the subject of discussion among Communist Party members and leaders. You were aware of their membership in the Communist Party and of their disapproval of your actions. For instance, you know that Freda Werb, James Conners, Clara Lester, and Sam Wiseman were Communist Party members and leaders and you know that your actions hostile to certain Communist Party policies and candidates were a matter of concern to them because, among other things, they called you before them in their official capacity as Communists and admonished you.

2. Criterion (1): Information before this Board indicates that you had and may still have a sympathetic interest in the Communist movement. This information is that contained in paragraph 1, preceding.

3. Criterion (16): You completed and signed two "Personnel Security Questionnaires" and a Certificate of Non-Affiliation with Certain Organizations," each containing deliberate falsifications, misrepresentations, and omissions of material facts. One such Questionnnaire was dated 8 September 1954, and the other was dated 2 July 1956, and the Certificate of Non-Affiliation was dated 2 July 1956. The Questionnaire and the Certificate were delivered to the Bell Aircraft Corporation, Buffalo, New York, your then employer, and each contained a statement certifying that the entries "made by me are true, complete, and correct to the best of my knowledge and belief

that petitioner had made false or misleading statements in his written reply to the original Statement of Reasons and in his testimony before the Hearing Board during the hearing held on November 1, 2, and 14, 1956.

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and are made in good faith." These falsifications, misrepresentations, and omissions were:

(1) By Item 25 of each of the two Questionnnaires you were requested to list all of your places of residence "from 1 January 1937, starting with present." In response to this request, you omitted from each of these two Questionnaires your place of residence at 1464 Michigan Avenue, Buffalo, New York, where you resided during a portion of the years 1942 and 1943.

(2) By Item 26 of the Questionnaire dated 8 September 1954, you were requested to show your "Organizational Membership (List all organizations except labor unions in which you held or have held membership)." In response to this request, you inserted the word "None." By Item 26 of the Questionnaire dated 2 July 1956 you were requested to show your "Organizational Membership. List all organizations except labor unions and except organizations listed on DD Form 48–1 in which you hold or have held membership." In response to this request you entered the word "None." In the Certificate of Non-Affiliation, in response to a series of questions asking whether you then were or ever had been a member of, or associated or affiliated with, any of a list of organizations which included, among others, the following: "Communist Party, U.S.A., its subdivisions, subsidiaries and affiliates," and "Socialist Workers Party, including American Committee for European Workers' Relief" you entered the word "No." As set forth in paragraph 1 herein, you had been a member of the Communist Party, and had been and might still be associated and affiliated with the Communist Party, and had been and might still be associated and affiliated with the Socialist Workers Party.

4. Criterion (15): Information before this Board indicates that you are not reliable or trustworthy. This information is:

Petitioner submitted a written reply to the Amended Statement of Reasons on June 25, 1958 (R. 75–86). He noted that (as he thought) the Amended Statement was substantially identical with the former charges and again, in general, denied the truth

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(1) The information set out under paragraphs 1, 2, and 3 above.

(2) Your sworn reply dated October 9, 1956 to the Statement of Reasons issued under date of September 10, 1956, and your testimony given under the applicability of Title 18, Section 1001, of the United States Code, during the hearing held in your case before the New York Industrial Personnel Security Hearing Board on November 1, 2, and 14, 1956, contain, in substance, the following material statements which were deliberately and knowingly either false or misleading:

(a) That you have never been a member of the Communist Party or of any branch of the Communist Party.

(b) That before your receipt of the Statement of Reasons in this case you had no knowledge of the subversive aims and purposes of the Communist Party.

(c) That you have never had a sympathetic interest in Communism.

(d) That you have not knowingly paid Communist Party dues.

(e) That you have never paid any money that to your knowledge went to the Communist Party.

(f) That you have not attended Communist Party meetings.

(g) That you have never visited Communist Party Headquarters when located at 75½ W. Chippewa Street, Buffalo, New York.

(h) That no group or organization other than your own local union sought your support for opposition to the "no strike pledge" during 1942 and 1943 while you were employed by Bell Aircraft at Buffalo, New York.

(i) That you did not know Clara Lester or ever hear her name until the hearing mentioned in subparagraph 4(2), preceding.

(j) That you did not know Svea Katc (Katz).

of the adverse information contained in the Statement, including the new matters which had not been part of the original charges.

With respect to his right to a new hearing before the Board, petitioner stated that he desired a hearing

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(k) That you did not know Sam Wiseman, at least not prior to 1943.

(l) That your answer "None" to Item 26 of your aforementioned Personnel Security Questionnaires dated 8 September 1954 and 2 July 1956, in so far as such answer was intended to encompass membership in the Communist Party or any of its subdivisions, subsidiaries, and affiliates, was a truthful answer.

(m) That your answer "No" to questions 1 through 6 of your aforementioned "Certificate of Non-Affiliation with certain Organizations" dated 2 July 1956, in so far as such answer was intended to encompass membership in the Communist Party or any of its subdivisions, subsidiaries, and affiliates, and in so far as it was intended to encompass affiliation or association with the Socialist Workers Party or with the Communist Party or any of its subdivisions, subsidiaries, and affiliates, was a truthful answer.

(3) The information before this Board which forms the basis for the allegations contained in this Amended Statement of Reasons shows that the information relied upon combines a specific reference to one of the following names: "Charles Taylor" or "Charlies Taylor" or "Chas. Taylor" or "Charles T" or "Charles Allen Taylor" with one or more of the following descriptive items all of which, according to information before this Board, apply to you: (A) He was employed by Bell Aircraft Corporation, Buffalo, New York, during 1942 and 1943 and left Buffalo before 1945. (b) In his employment by Bell Aircraft in Buffalo, New York, he worked as a tool maker. (c) He was a member of Local 501, UAW-CIO, at Bell Aircraft in Buffalo, New York, and held office of union shop steward and union committeeman. (d) He resided at 523 Masten Avenue, Buffalo, New York, except that for a short while in the years 1942 and 1943 he left that address and resided at an address on Michigan Avenue, Buffalo, New York, and this ad-

only in the event that the Board would confront him with the evidence upon which the Amended Statement of Reasons was based (R. 85). In response to this qualified request, the Hearing Board advised petitioner's counsel that "It is a standard procedure of the Department of Defense to invite witnesses to the extent that security considerations permit. The Department does not make it a practice to reveal the names of Government witnesses which it may intend to produce in advance of a hearing, nor is it prepared to state as a matter of fact whether any witnesses will be available in the instant case at the time of hearing" (R. 87). In reply to the Board's renewed request that petitioner advise it whether or not he desired a further hearing (R. 87–88), petitioner's counsel, by telephone, agreed with the Board that a hearing should be scheduled for July 11, 1958 (R. 88).

On that date, a hearing was held (R. 88–94, 425–33) at which petitioner was informed that efforts by the

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dress was 1464 Michigan Avenue, Buffalo. (e) In 1943, he took a leading part in a brief strike at Bell Aircraft where he worked. (f) In 1943, he was elected as a delegate from local 501 to the 1943 UAW–CIO convention. (g) At the 1943 UAW–CIO convention to which he went as a delegate, he voted in support of the Reuther Group. (h) At a local union meeting in July 1943, at which a resolution supporting Lewis' strike policy was passed, he spoke in favor of this policy on the union floor. (i) A photograph.

5. Criterion (20): Information before this Board furnishes reason to believe that you may be subject to coercion, influence or pressure which may cause you to act contrary to the best interests of the national security. This information is that contained in paragraphs 1, 2, 3, and 4 preceding.

Government to obtain witnesses were still incomplete. Petitioner's request for additional information concerning the sources of the Government's evidence and the informants available to the Board was, with one minor exception (R. 92), denied (R. 89–93). Petitioner took the position that, without confrontation of witnesses and an opportunity to examine the adverse information, the hearing could not proceed in good faith, and no additional evidence was presented (R. 20, 93–94).

On July 23, 1958, petitioner's counsel was informed that the Government's attempt to obtain witnesses had been completed and that, within the limitations of security considerations, the only witnesses the Board would be able to present could testify solely to petitioner's place of residence in Buffalo during a portion of the years 1942 and 1943 (R. 94–96). Counsel was advised that this testimony would be relevant, not only to the omission of this information by petitioner from his Personnel Security Questionnaires (see ¶ 3(1) of the Amended Statement of Reasons, set out in note 4, *supra*, at pp. 14–15), but also to "Mr. Taylor's alleged former membership in the Communist Party inasmuch as some of the information tending to show his membership in the Communist Party reflects his residence during that period at that address" (R. 95). The Board stated that it proposed to conduct one further hearing to receive the testimony of these witnesses and any other evidence that either side might desire to introduce.

Petitioner's counsel responded on July 25, 1958,

that he was willing to stipulate to the omission of the address on the Personnel Security Questionnaire and that he saw no purpose to examining witnesses who could testify only to the fact of residence, which was admitted, and not to its relationship to membership in the Communist Party (R. 97–102). This offer to stipulate was accepted by the Hearing Board, and a further hearing was scheduled for August 1 for the purpose of introducing additional matters into the record (R. 435).

At the August 1st hearing (R. 102–15, 434–57), the Chairman of the Board read into the record detailed information obtained from six confidential sources concerning the charges against petitioner (R. 102–04). Counsel for petitioner posed several questions concerning these sources (R. 106–14). The Board reserved its ruling on the questions until August 11, 1958, when it advised petitioner's counsel that it could not, for security reasons, furnish him the information requested since it concerned "confidential sources of information, investigative techniques and disclosure of efforts made by the Board to assess the reliability and weight of the sources of the information" (R. 114–17).

On September 12, 1958, petitioner moved for summary judgment in the District Court in this action which, as noted above, had been commenced on April 24, 1958 (*supra*, p. 10) (R. 21). By a letter dated October 13, 1958, petitioner was advised by the Director of the Office of Industrial Personnel Security Review that the Hearing Board had again determined, on the basis of all the available information, that the granting of clearance

to petitioner for access to classified defense information would not be clearly consistent with the interests of national security (R. 118–19). Petitioner was at that time furnished with a statement of the Board's findings on the allegations contained in the Amended Statement of Reasons (R. 120–24). Most of the charges were upheld, with the following significant omissions: (a) it was not found that petitioner had ever had a sympathetic interest in Communism, that he had been a *sympathetic* member of the Communist Party, or that he had lied when he denied charges to that effect; (b) it was not found that petitioner had been affiliated with the Socialist Workers Party, or that he had lied when he denied that charge; (c) there were no findings as to possible Communist membership or associations after 1943.

On the following day (October 14), petitioner's motion for summary judgment, along with a similar motion made by respondents, was heard before the District Court (R. 458–75). The court ruled from the bench that respondents were entitled to judgment as a matter of law under the "controlling" decision of the Court of Appeals in *Greene* v. *McElroy, supra* (R. 473–76). On the same day, petitioner filed a notice of appeal, and the record was docketed in the Court of Appeals on October 16, 1958. The petition for a writ of certiorari was filed on November 8, 1958, seeking review prior to the rendition of judgment in the Court of Appeals. The respondents' memorandum on the petition was filed on December 8, 1958.

On December 15, 1958, this Court granted the petition (358 U.S. 918) and assigned the case for argument immediately preceding the *Greene* case, No. 180.

As stated in the respondents' memorandum in response to the petition, the case remained the subject of continuing administrative review by the Departments of Defense and Justice. That review culminated in the further administrative action taken on December 31, 1958, which is reflected in the documents reproduced in the Appendix to the respondents' Memorandum Suggesting that the Cause Is Moot. In summary, the Acting Secretary of Defense, on that date, signed a Finding and Order in which he found that "the requested clearance of Charles Allen Taylor is in the national interest and I so order, hereby superseding all previous orders in this case." On the same date, the Defense Department, by letter, advised petitioner, his counsel, the Commander of the Air Material Command, and the Bell Aircraft Corporation that that determination had been made and that all previous determinations in petitioner's case were thereby superseded. As indicated in the General Counsel's letter of January 6, 1959, to petitioner's counsel, the determination by the Acting Secretary on December 31st expunged all previous findings in the case as if they had never been rendered.

On February 24, 1959, this Court entered an order postponing further consideration of the respondents' suggestion of mootness to the hearing of the case on the merits.

ARGUMENT

I

By an order dated December 31, 1958, the Acting Secretary of Defense set aside the determination that petitioner's access to classified defense information was not clearly consistent with the interests of national security, granted petitioner the security clearance requested by his employer, and expunged all prior findings in the case as if they had never been rendered. In our Memorandum Suggesting that the Cause Is Moot, and in our memorandum in reply to petitioner's opposition to that suggestion, to which the Court is respectfully referred, we develop at length the reasons why, under this Court's established practice, that order has rendered the cause moot. The judgment of the District Court should therefore be vacated and the cause should be remanded with directions to dismiss the complaint on that ground.

In our Memorandum in Reply to Petitioner's Opposition to the Suggestion of Mootness (pp. 4–9), we pointed out that the Defense Department regulations would be formally amended in the near future to incorporate a general change in the Industrial Security Program put into effect by the Acting Secretary's memorandum to the Assistant Secretary of December 31, 1958. Pursuant to that memorandum, the level of classified information to which access is sought, as well as the derogatory information in a particular case, must be taken into account in determining whether or not a security clearance should be granted. The

amendment to the regulations is now being finally reviewed and will be filed with the Court as soon as it is issued.

II

If the cause has not been rendered moot, the judgment of the District Court should be affirmed for the reasons stated in the respondents' brief in *Greene* v. *McElroy*, No. 180, this Term. In that brief we show that the Industrial Security Program is a valid exercise of the executive power of the President to control the dissemination of military secrets to private persons. We also demonstrate that the interest of an employee of a government contractor in obtaining access to classified defense information cannot be considered "liberty" or "property" entitled to the procedural protections of the Fifth Amendment. Finally, even if the requirements of procedural due process are held applicable, we point out the considerations justifying the procedures employed in the program and why those requirements have not been violated in these cases.

CONCLUSION

For the reasons stated in our memoranda on mootness, it is respectfully submitted that the judgment of the District Court should be vacated and the cause remanded with directions to dismiss the complaint as moot.

If the cause is not held moot, it is respectfully submitted, for the reasons stated in our brief in *Greene*

v. *McElroy*, No. 180, this Term, that the judgment of the District Court should be affirmed.

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